No. 90-522

In The

Supreme Court of the United States

October Term, 1990

PATRICK J. McNAMEE AND JOSEPHINE McNAMEE, H/W

Petitioners,

v.

SOUTHERN TEXTILE CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Third Circuit correctly determined that Southern Textile Corporation's ("Southern") principal place of business is in Pennsylvania for purposes of subject matter jurisdiction where, as of the date petitioners' complaint was filed, all of Southern's business activity took place in Pennsylvania and Southern was a wholly-owned and controlled subsidiary of H.K. Porter Company, Inc., whose principal place of business was itself in Pennsylvania.

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COUNTERSTATEMENT OF THE CASE

On December 5, 1988, petitioners, citizens of Pennsylvania, filed the instant diversity action against Southern Textile Corporation ("Southern") and others for injuries allegedly sustained as a result of occupational exposure to asbestos.[1] The instant petition arises out of the United States Court of Appeals for the Third Circuit's determination that Southern's principal place of business is in Pennsylvania, thereby making it a citizen of that state for purposes of federal subject matter jurisdiction.

In addition to the facts set forth by petitioners, the affidavits of Southern's agents, Michael Mochniak and David Howes, reproduced in petitioners' appendix at A-17 and A-18, indicate that Southern's corporate records are located and maintained at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania. The affidavits further indicate that Southern's business meetings are conducted at that location and that service of process is made and accepted there.

Furthermore, as is demonstrated by the deposition and June 23, 1989 declaration of David Howes, Southern has been and continues to be an active corporation which since 1983 has been involved in the prosecution and defense of tens of thousands of asbestos-related lawsuits[2]. Corporate decisions regarding the prosecution,

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[1] Southern's parent company is H.K. Porter Company, Inc. Southern has no subsidiaries.

[2] Selected portions of Mr. Howes' deposition are reproduced in petitioners' appendix at A-19 - A-27. Mr.

(Continued on following page)

defense and settlement of said litigation are made by Southern's duly designated officers and directors solely in Pittsburgh, Pennsylvania on an on-going daily basis. Similarly, decisions regarding the issuance and receipt of disbursements regarding said litigation are made in Pittsburgh, Pennsylvania. All decisions regarding the retention of counsel as well as decisions regarding the acquisition and retention of insurance coverage are made by the officers and directors of Southern in Pittsburgh, Pennsylvania (A-29 - A-30). Moreover, the officers and directors of Southern are all residents of Pennsylvania (A-29). Southern has not formally terminated its operations, is not engaged in "winding up" procedures, nor has it executed an agreement of dissolution and liquidation (A-22 and A-30). Southern's assets presently consist of insurance coverage and bank accounts. Said insurance contracts were entered into by Southern in Pennsylvania and said bank accounts are maintained by Southern in Pennsylvania (A-29 and A-30). Moreover, petitioners have not and cannot present this court with any evidence that Southern has permanently abandoned manufacturing or the textile industry. In fact, Southern's 1988 tax return indicates the nature of Southern's business as "Textile Products" (A-30).

Furthermore, at all relevant times herein, it is undisputed that Southern has been a wholly owned subsidiary of H.K. Porter Company, Inc. ("Porter") whose principal place of business is in Pennsylvania (A-20, A-21 and

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Howes' June 23, 1989 declaration is reproduced in petitioners' appendix at A-29 - A-31. As used throughout this brief, "A-___" refers to petitioners' appendix.

A-30). Each of Southern's current officers and directors is also an officer and director of Porter and each is employed by Porter in Porter's Pittsburgh, Pennsylvania office. Southern's officers', directors' and shareholders' meetings are held at the offices of Porter in Pittsburgh, Pennsylvania. Corporate books, records and minutes for Southern are located and maintained at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania at the Porter offices. The business meetings of Southern are conducted in Porter's offices in Pittsburgh, Pennsylvania. Service of process as to Southern is made and accepted at the Porter offices at 1500 Porter Building, 601 Grant Street, Pittsburgh, Pennsylvania and there is no authorized agent for the acceptance of service of process in the state of North Carolina or anywhere else. Southern sold its textile manufacturing facilities in North Carolina in 1983, five and a half years prior to the filing of petitioners' complaint (A-29 - A-31). Southern owns no assets or property in North Carolina (A-25) nor does it actively conduct manufacturing operations there (A-24 and A-29). All of Southern's corporate decisions and business activities occur at the offices of Porter in Pittsburgh, Pennsylvania (A-30).

The district court's holding that Southern is a citizen of Pennsylvania for purposes of diversity was based in part upon its finding that, as of the date petitioners' complaint was filed, Southern was a wholly owned and controlled subsidiary of H.K. Porter Company, Inc., whose principal place of business was indisputably in Pennsylvania (A-2 - A-6).

The Third Circuit's affirmance of the district court's decision was based upon its finding that Southern was an

active corporation involved in the prosecution and defense of numerous asbestos-related lawsuits, that all of Southern's affairs are conducted from Pennsylvania, and that all of Southern's business activities are centered in Pennsylvania (A-10 - A-15).

REASONS FOR DENYING THE PETITION

The Third Circuit properly relied upon other appellate court decisions in affirming the district court's decision regarding Southern's citizenship for purposes of federal subject matter jurisdiction. Moreover, the Third Circuit's decision, which affirmed the dismissal of petitioners' complaint, furthers the policy behind 28 U.S.C. Section 1332(c) of limiting the availability of diversity jurisdiction. The Third Circuit's decision is not inconsistent with the district and appellate court decisions cited by petitioners. Indeed, all cases cited by petitioners stand for the same proposition: a corporation's principal place of business for purposes of subject matter jurisdiction will be in that state where its presence is strongest. Furthermore, the issue of whether the court below adopted an inconsistent "test" in determining Southern's principal place of business is moot since Southern is the wholly owned and controlled subsidiary of H.K. Porter Co. Inc., whose principal place of business is in Pennsylvania.

A. The Third Circuit properly determined Southern's citizenship for purposes of diversity pursuant to federal law.

"Determination of one's State of citizenship for diversity purposes is controlled by federal law, not by the law

of any State." *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974), *reh'g denied*, 492 F.2d 1242 (1974), *cert. denied*, 419 U.S. 842 (1974); *Lincoln Associates v. Great American Mortg. Investors*, 415 F. Supp. 351, 353 (M.D. Tex. 1976) (determination of defendant's citizenship for diversity purposes is "strictly a matter of federal law"); 1 J. Moore, *Moore's Federal Practice* Para. 0.74[1] at 707.1 (1972).

Indeed, since the issue of a court's subject matter jurisdiction based on diversity of citizenship can only arise in federal court, federal common law, rather than state law, must determine the issue. As the court stated in *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968):

> The question of domicile can arise, in regard to the diversity clause of Article III, Section II of the Federal Constitution and under 28 U.S.C. Section 1332, only in federal court. The problem is, therefore, one uniquely of federal cognizance and the considerations underlying *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), do not obtain.

Thus, even in the event of a conflict between federal and state law, federal law must control the issue of citizenship for diversity purposes since a state has no legally cognizable interest in the application of its law to a federal court's determination of subject matter jurisdiction.

On the other hand, subject to the requirements of the due process clause of the Fourteenth Amendment, the extent of a federal court's personal jurisdiction is determined by state law. *Davis H. Elliot Co., Inc. v. Caribbean Utilities Co., Ltd.*, 513 F.2d 1176 (6th Cir. 1975). However, Southern does not contest personal jurisdiction, but

rather federal subject matter jurisdiction. Thus, petitioners' reliance on *Green v. Chicago, Burlington & Quincy R.R. Co.*, 205 U.S. 530 (1906) and *Buffalo Batt & Felt Corp. v. Royal Manufacturing Co.*, 27 F.2d 400 (W.D.N.Y. 1928) is misplaced. Both cases concern only the extent of the federal court's personal jurisdiction and, as such, are inapplicable to the case at bar.

Petitioners' reliance on *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1986) is also misplaced. In that case, the Court held that an Indiana securities act did not violate the Commerce Clause and was not preempted by a somewhat similar federal act. The issue of citizenship for purposes of diversity was not before the Court.

B. The Third Circuit's decision affirming the district court's dismissal of Southern for lack of diversity as required by 28 U.S.C. Section 1332 comports with the policy the statute was designed to serve.

Diversity of citizenship must be complete to confer jurisdiction under 28 U.S.C. Section 1332. *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365 (1978). As the court stated in *Northeast Nuclear Energy Co. v. General Electric Co.*, 435 F. Supp. 344, 346 (1977), "the purpose of diversity jurisdiction is to avoid the effects of prejudice against outsiders."

With respect to the citizenship of a corporate defendant, 28 U.S.C. Section 1332(c) provides:

> for purposes of this section and Section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

"This dual citizenship requirement was intended to *restrict* the availability of diversity jurisdiction in cases involving corporations . . . by denying federal court access to 'essentially local corporations which were incorporated in outside states' (citations omitted)." *Bonar, Inc. v. Schottland,* 631 F. Supp. 990, 993 (E.D. Pa. 1986) (emphasis in original). See also *Panalpina Welttransport GMBH v. Geosource, Inc.,* 764 F.2d 352, 354 (5th Cir. 1985) (A corporation will be considered a citizen of several places for purposes of diversity jurisdiction "in keeping with Congress' intendment to constrict the availability of diversity jurisdiction."); *Northeast Nuclear Energy Co. v. General Electric Co., supra,* 435 F. Supp. at 346 (The dual citizenship requirement of 28 U.S.C. Section 1332(c) was "designed to prevent an essentially local corporation from litigating its controversies with local citizens in federal courts."); *Kelly v. United States Steel Corp.,* 284 F.2d 850, 852 (3rd Cir. 1960) (28 U.S.C. Section 1332(c) "is, as appears in its legislative history, an effort to reduce the number of cases coming to federal courts on the ground of diversity of citizenship only.")

Petitioners, residents and citizens of Pennsylvania, sought to initiate suit against Southern in federal court rather than state court, presumably in hopes of obtaining an earlier trial date. Whatever motivated petitioners' choice of forum, it is clear beyond cavil they have not sought to adjudicate their claim in federal court "to avoid the effects of prejudice against outsiders." Thus, the Third Circuit's affirmance of the district court's decision in the case at bar comports with the policy which Section 1332(c) was designed to serve: the reduction of the number of diversity cases in federal court.

C. The Third Circuit's decision is consistent with previous appellate and district court decisions.

Petitioners' third argument is based upon the proposition that the Third Circuit's decision is inconsistent with other circuit court decisions. Petitioners cite a number of cases which supposedly illustrate four inconsistent approaches or "tests" used by federal courts to determine a corporation's principal place of business.[3] Despite petitioners' chimeric categorization, the cases cited are in no way inconsistent with the Third Circuit's decision in the case at bar.[4] Indeed, all the cases cited by petitioners, including the Third Circuit's decision in the case at bar, stand for the same proposition: a corporation's principal place of business is in that state where its presence is

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[3] These are the so-called "state of incorporation" test, the "forum of last business activity" test, the "forum of last principal business activity" test and the "forum of corporate conclusion" test.

[4] Pursuant to Supreme Court Rule 10.1(a) certiorari may be appropriate "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter", not when there is merely an alleged "inconsistency of opinion expressed by the circuit courts". (Petitioners' brief p.7). Thus, even assuming *arguendo* the district court opinions upon which petitioners rely are inconsistent with the instant case, such may not constitute a ground for granting certiorari. Moreover, as set forth herein, the three appellate court cases cited by petitioners, *Gavin v. Read Corporation*, 356 F.Supp. 483 (E.D. Pa. 1973), *aff'd.* 523 F.2d 1050 (3d Cir. 1975), *Riggs v. Island Creek Coal Company*, 387 F.Supp. 1363 (S.D. Ohio 1974), *rev'd on other grounds*, 542 F.2d 339 (6th Cir. 1975) and *Co-Efficient Energy Systems v. CSL Industries, Inc.*, 812 F.2d 556 (9th Cir. 1987), are consistent with the Third Circuit's opinion in the instant case.

strongest; conversely, a corporation's principal place of business will not be found to be in a state where it conducts no business whatsoever. Moreover, *by petitioners' own admission*, the only other appellate court decision regarding the principal place of business of a corporation whose sole current business activity consists of managing litigation to which it is a party, *Co-Efficient Energy Systems v. CSL Industries, Inc.*, 812 F.2d 556 (9th Cir. 1987), is entirely consistent with the Third Circuit's decision in the instant case (Petitioners' brief p. 15).

1. The cases cited by petitioners in support of the purported "State of Incorporation" test are distinguishable from the case at bar.

Petitioners cite *Gavin v. Read Corp.*, 356 F. Supp. 483, (E.D. Pa. 1973), *aff'd.*, 523 F.2d 1050 (3d Cir. 1975) and *Sanders Plumbing Co. v. B.B. Anderson Const. Co.*, 660 F. Supp. 752 (D. Kan. 1987) for the proposition that some courts have determined that an inactive corporation has no principal place of business and, as such, is only a citizen of its state of incorporation. However, *Gavin* and *Sanders* are distinguishable from the case at bar and, therefore, may not be considered inconsistent therewith.

In *Gavin v. Read Corp., supra*, defendant Read moved to dismiss for lack of diversity on the ground its principal place of business was in Pennsylvania, the same state in which the plaintiff resided. The court determined Read's principal place of business was not in Pennsylvania because at the time plaintiff's complaint was filed, Read was not conducting any business in Pennsylvania and

was not yet a wholly owned subsidiary of a Pennsylvania Corporation.

As the Third Circuit correctly held, the case at bar is clearly distinguishable from *Gavin* since petitioners in the instant case have not and cannot establish that Southern was an inactive corporation at the time petitioners' complaint was filed (A-14).[5] Indeed, the Third Circuit correctly recognized that the evidence establishes that Southern is an active corporation involved in the prosecution and defense of numerous asbestos related lawsuits and that all corporate decisions regarding said litigation are made by Southern in Pennsylvania (A-15).

The instant case is also distinguishable from *Gavin* since at the time petitioners' complaint was filed, Southern was a wholly owned and controlled subsidiary of H.K. Porter Company, Inc., a Pennsylvania Corporation.[6] Furthermore, even assuming that *Gavin* is inconsistent with the instant case, such may not constitute a ground for granting certiorari since both cases were decided by

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[5] A party who seeks to establish subject matter jurisdiction has the burden of proving all of the facts required to sustain it. *Thomas v. Gaskill*, 315 U.S. 442 (1942). Moreover, diversity of citizenship for purposes of subject matter jurisdiction is determined as of the time of the filing of the complaint. *Gilbert v. David*, 235 U.S. 561 (1914). Thus, petitioners were required to establish that Southern did not have its principal place of business in Pennsylvania on December 5, 1988, the date their complaint was filed.

[6] Where the parent corporation makes all business decisions and completely dominates the subsidiary, the subsidiary's principal place of business is that of the parent. See Section D, *infra*.

the Third Circuit. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (conflicting decisions from the same appellate court "should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification").

Petitioners' reliance on *Sanders Plumbing Co. v. B.B. Anderson Const. Co., supra,* is similarly misdirected. In that case, the court refused to find that one of the defendant's principal places of business was in Missouri where the evidence failed to demonstrate the defendant conducted any business whatsoever in that state.

In essence, both *Gavin* and *Sanders* stand for the proposition that a corporation's principal place of business may not be deemed to be in a state where it conducts no business activity whatsoever. Since the court's decision in the case at bar finding Southern's principal place of business to be in Pennsylvania was based upon its finding that all of Southern's business activities are centered in Pennsylvania and all of its affairs are conducted from Pennsylvania, the instant case is not inconsistent with either *Gavin* or *Sanders*.

2. The cases supporting petitioners' purported "Forum of Last Business Activity" test are consistent with the case at bar.

Petitioners cite *Comtec, Inc. v. National Technical Schools*, 711 F. Supp. 522 (D.Ariz. 1989) and *Wm. Passalacqua Builders v. Resnick Dev. South*, 608 F. Supp. 1261 (S.D.N.Y. 1985) for the proposition that some courts have determined that an inactive corporation's principal place of business is in the state where the corporation last

conducted business. As with *Gavin* and *Sanders*, both *Comtec* and *Wm. Passalacqua* involved inactive corporations and as such are distinguishable from the case at bar.

Specifically, in *Comtec, Inc. v. National Technical Schools, supra*, plaintiff, a Nevada corporation, brought suit against a California defendant. Defendant removed the case to federal court based on diversity and plaintiff moved to remand on the ground that it too was a citizen of California by virtue of having its principal place of business in that state. The court held plaintiff's principal place of business to be in California since the evidence established that plaintiff's last business activity, including all corporate activity regarding the winding down of its affairs after it had ceased active business operations, took place in California.

Even accepting petitioners' bald, conclusory and incorrect contention that Southern is active in Pennsylvania solely for the purpose of closing out its affairs, the Third Circuit's decision in this case is consistent with *Comtec* since the evidence establishes that all of Southern's decisions regarding said affairs are made by Southern in Pennsylvania.

Petitioners' reliance on *Wm. Passalacqua Buildings v. Resnick Dev. South, supra*, is likewise misdirected. In that case, the court held that an inactive defendant corporation's principal place of business did not exist in a particular state merely because the corporation conducted litigation in that state absent a showing of other business activity there or a showing that corporate decisions regarding said litigation were also made in that state.

Like *Gavin* and *Sanders, Wm. Passalacqua* stands for the proposition that a corporation's principal place of business may not be deemed to be in a state where it conducts no business activity.

3. The cases supporting petitioners' purported "Forum of Last Principal Business Activity" test are consistent with the case at bar.

Petitioners cite *National Spinning Co. v. The City of Washington, North Carolina,* 312 F. Supp. 958 (E.D.N.C. 1970) and *Riggs v. Island Creek Coal Co.,* 387 F. Supp. 1363 (S.D. Ohio 1974), *rev'd. on other grounds,* 542 F.2d 339 (6th Cir. 1976) for the proposition that some courts have ignored the location of the corporation's "corporate" management activity in determining its principal place of business and looked only to the state where its principal business activity is located. However, even a cursory reading of those cases will reveal that they both stand for the same proposition: the location of the corporation's day-to-day activity and management determines its principal place of business. As such, both cases are consistent with the case at bar and with every other decision cited by petitioners.

In *National Spinning,* plaintiff, incorporated in New York, brought a diversity action against a North Carolina defendant. Defendant moved to dismiss for lack of diversity on the ground that plaintiff's principal place of business was in North Carolina and, therefore, it too was a citizen of that state. The evidence established that while much of plaintiff's corporate policy and planning took place in New York, the management of the daily on-going

affairs of actually running the business took place in North Carolina. Indeed, the district court specifically recognized that "it is apparent that the management of the daily on-going affairs of running the business . . . is carried out within the state of North Carolina." *Id.* at 960. Thus, the court held the corporation's principal place of business to be in North Carolina.

The rule set forth in *Riggs v. Island Creek Const. Co., supra,* is essentially the same. In *Riggs,* an Ohio plaintiff brought suit against a mining company whose corporate headquarters were in Ohio but whose day-to-day mining operations took place in other states. Defendant removed the case to federal court and thereafter moved to dismiss for lack of diversity. In denying defendant's motion to dismiss, the district court determined defendant's principal place of business was not in Ohio since most of its day-to-day mining operations were conducted in other states.

On appeal, the Sixth Circuit affirmed the district court's jurisdiction under an estoppel theory. However, the Sixth Circuit also held that the district court's negative finding that defendant's principal place of business was not in Ohio was insufficient to establish the court's jurisdiction in light of the fact there was no evidence as to precisely how much business defendant conducted in other states. The court held that where the corporation's operations are divided among many states "its office from which supreme direction and control of the business generally is had, including the operations of the several plants, may, and perhaps must, be deemed the principal place of business." *Riggs v. Island Creek Coal Co., supra,*

542 F.2d at 342 citing *Continental Coal Corp. v. Roszelle Bros.*, 242 F.243 (6th Cir. 1917).

Thus, petitioners' contention that *National Spinning* and *Riggs* "specifically exclude[ ] in certain instances, consideration of "corporate" (management) activity as the site of the principal place of business" (Petitioners' brief p.14) represents a fundamental misunderstanding of both of those cases. As set forth above, the court's holding in *National Spinning* that plaintiff corporation was a citizen of North Carolina was based in part upon its finding that management of the corporation's day-to-day affairs took place in that state. Similarly, in *Riggs*, the Sixth Circuit found that where a corporation does business in many states, the location of corporate offices "may, and perhaps must, be deemed the principal place of business."

The Third Circuit's holding in the instant case is consistent with *National Spinning* and *Riggs* since the undisputed evidence in the case at bar establishes that both Southern's daily business activity and its center of corporate control are located in Pennsylvania.

4. A corporation whose sole activity consists of managing litigation has its principal place of business in the state where corporate decisions regarding said litigation are made.

Petitioners cite *Co-Efficient Energy Systems v. CSL Industries, Inc.*, 812 F.2d 556 (9th Cir. 1987) and the Third Circuit's decision in the case at bar for the proposition that some courts have "redefine[d] current activity and give weight in determining the viability of a corporation

whose current activities cut across the grain of standard notions of business purpose and profit." (Petitioners' brief p.15). Whatever petitioners' contention, *Co-Efficient* and the instant case stand for the proposition that a corporation whose sole, current business activity consists of managing litigation to which it is a party has its principal place of business in the state where corporate decisions regarding said litigation are made.

In *Co-Efficient*, plaintiff was a Nevada corporation initially formed to generate tax benefits through the buying and selling of energy management systems. However, at the time of the filing of the complaint in that case, Co-Efficient's sole business activity consisted of prosecuting a lawsuit in California. The court held Co-Efficient's principal place of business to be in California and granted the defendant's motion to dismiss for lack of diversity because the business decisions regarding the prosecution of said lawsuit were made by Co-Efficient in California.

As noted by petitioners, the Third Circuit's decision in the case at bar is entirely consistent with the Ninth Circuit's decision in *Co-Efficient* (Petitioners' brief p. 15).

D. The issue of whether the Third Circuit adopted an inconsistent "test" in determining Southern's principal place of business is moot since under any of petitioners' purported "tests" Southern's principal place of business is in Pennsylvania because it is a wholly owned and controlled subsidiary of H.K. Porter Company, Inc., whose principal place of business is in Pennsylvania.

Where the parent corporation makes all business decisions and completely dominates the subsidiary, the

subsidiary's principal place of business is that of the parent. A review of the facts of record in this matter, as demonstrated by the deposition (A-19 - A-27) and declaration (A-29 - A-31) of Mr. Howes, reveals that although Southern has maintained its proper corporate separateness, it is dominated by its Pennsylvania parent.

In *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 558 (5th Cir. 1985), the court held that "When two corporate entities act as one, or are in fact one, they should be treated as one for jurisdictional purposes." In so ruling, the court recognized that such a rule "furthers the intent of congress 'to minimize and reduce the caseload of federal courts based upon diversity' (citations omitted)." See also *Panalpina Welttransport GMBH v. Geosource, Inc., supra*, 764 F.2d at 354 (" . . . in keeping with Congress' intendment to constrict the availability of diversity jurisdiction . . . the alter-ego doctrine may be used to add places of citizenship to the abrogation of diversity but may not be used to extend such jurisdiction.")

Similarly, in *Toms v. Country Quality Meats, Inc.*, 610 F.2d 313 (5th Cir. 1980), Georgia plaintiffs brought a diversity action against a Delaware corporation which did business in Georgia but which was owned and operated by a corporation, B&W, whose principal place of business was in Texas. The appellate court held that the defendant's principal place of business was in Texas since it was "essentially run" by its parent corporation, B&W, whose principal place of business was in Texas, *Id.* at 314-315. In that case, the evidence established that B&W's officers, directors and shareholders were also the officers, directors and shareholders of defendant, that said officers were domiciled in Texas, that all major business policy

decisions were made in Texas and that the defendant's corporate records were maintained in Texas.

In *Frazier, III v. Alabama Motor Club, Inc.*, 349 F.2d 456 (5th Cir. 1965), plaintiffs brought a diversity action against defendants in Georgia district court and defendants moved to dismiss for improper venue. In analyzing defendants' contacts with the forum and the propriety of venue, the court determined that defendants were integrated subsidiaries of a parent corporation, National, whose principal place of business was in Georgia. As such, defendants' principal place of business was also found to be in Georgia. The court's holding was based upon its finding that:

> The corporate and business activities of each of the defendants, except the solicitation of memberships, are centered in the offices of National in Atlanta. These business activities are managed, directed and completely controlled by National under the administration of its officers.

Id. at 460.

Specifically, the evidence established that National's officers and directors were also the officers and directors of defendants; National made substantially all of the business decisions for defendants; National owned most of defendants' stock; defendants' board meetings were held at the offices of National; and defendants' record were kept at the offices of National.

The facts of the case at bar are materially indistinguishable from those of the cases cited above. Southern is the wholly owned and controlled subsidiary of Porter, whose principal place of business is indisputably

in Pennsylvania (A-20, A-21 and A-30). Each of Southern's current officers and directors are also officers and directors of Porter, each is employed by Porter in Porter's Pittsburgh, Pennsylvania office (A-30) and each is a resident of Pennsylvania (A-29). All of Southern's corporate decisions and business activities occur in the offices of Porter in Pittsburgh, Pennsylvania (A-30). Moreover, Southern's officers' and directors' and shareholders' meetings are held at the offices of Porter and Southern's books, records and minutes are kept at the Porter offices in Pittsburgh, Pennsylvania (A-30).

Based upon the foregoing, Southern respectfully submits that the Third Circuit and the district court below correctly concluded that Southern's principal place of business is in Pennsylvania for purposes of federal subject matter jurisdiction.[7] Moreover, since Southern is wholly owned and controlled by H.K. Porter Company, Inc., its principal place of business is in Pennsylvania regardless of which of petitioners' "tests" is applied. Therefore, the issue of whether an inconsistent "test" was adopted by the court in this case, as contended by petitioners, is moot.

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[7] The district court's opinion finding Southern's principal place of business to be in Pennsylvania was for the most part based upon the fact that it is a wholly owned and controlled subsidiary of H.K. Porter Company, Inc. whose principal place of business is in Pennsylvania. *McNamee v. The Celotex Corp.*, No. 88-9259 (E.D. Pa. July 12, 1989) (A-4 - A-6). While the Third Circuit did not expressly reach the domination issue, it did so implictly since it based its holding on the fact that all of Southern's business activities are conducted from Pennsylvania (A-15).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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